

Internal Revenue Service

memorandum

CC:TL:Br2

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date: MAY 28 1987

to: District Counsel, Louisville CC:LOU

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This memorandum is in response to your request for technical advice.

ISSUE

Can the Government assert a set-off issue, pertaining to a carryback year, against a net operating loss carryback to that carryback year, where the Government and the taxpayer had previously entered into a Form 870-AD agreement with respect to that carryback year.

DISCUSSION

The Form 870-AD provides:

If this offer is accepted for the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, deficiencies or overassessments resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and Subchapter S items determined at the partnership and corporate level, or excessive tentative allowances of carrybacks provided by law; and no claim for refund or credit shall be filed or prosecuted for the year(s) stated above other than for amounts attributed to carrybacks provided by law.

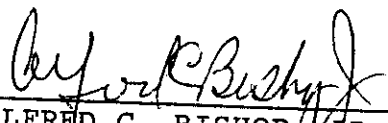
The above language contained in the Form 870-AD agreement, clearly provides that the Government cannot reopen an agreed upon tax year in the absence of certain specified exceptions. Yet, the agreement expressly permits a taxpayer to claim an NOL carryback to that year, and then likewise permits the Government to reopen that year for an excessive tentative allowance of a carryback provided

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by law. The agreement does not, however, provide an exception for a set-off against an NOL carryback. With respect to a Form 870-AD agreement, we believe that raising an issue by means of a set-off to a carryback is no different than independently raising that issue by attacking that tax year. Accordingly we conclude that, in the absence of one of the designated exceptions, the Government should not raise a set-off issue pertaining to a carryback year where the taxpayer has previously entered into a Form 870-AD agreement with regard to that tax year. Moreover, the Government has in the past always argued that a taxpayer was estopped from filing a refund claim with regard to a tax year for which the taxpayer and the Government had entered into a Form 870-AD agreement. See, Stair v. United States, 516 F.2d (2d Cir. 1975); D.D.I. Inc. v. United States, 467 F.2d 497 (Ct. Cl. 1972). The Government should thus also be estopped from advancing a set-off against a net operating loss carryback, where the Government and the taxpayer had previously entered into a Form 870-AD agreement with respect to that carryback year.

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By:

  
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